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Office of the Inspector General



Investigation of the  
New York Power Authority

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Inspector General

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## **I. EXECUTIVE SUMMARY**

The New York State Inspector General received allegations of flawed procurement practices, Board member improprieties, and questionable contributions at the New York Power Authority (NYPA). In response, the Inspector General conducted a broad investigation into these allegations and found weaknesses in numerous policies and procedures at NYPA that resulted in inadequate procurement practices, ethical lapses, and the lack of a formal policy with regard to business expenses that are contributory in nature.

One allegation the Inspector General investigated asserted inadequate procurement practices in the retention of outside legal services. While NYPA employs a general counsel and assistant counsels, it outsources certain legal matters deemed beyond the purview or expertise of the Legal Department. In order to solicit firms to handle such legal matters, NYPA, in 2009 and 2010, drafted three Legal Services Requests for Proposal (RFP) in the areas of Financial Services, General Legal Services and Energy Legal Services. The Inspector General reviewed these three procurements and found NYPA's process for selecting Legal Services Counsel to be deficient. Specifically, the Inspector General found that (1) NYPA's initial process for selecting firms is not uniform; (2) reviewers for the General Legal Services and Energy Legal Services procurements were inexperienced in conducting analysis and given little direction; (3) documents generated by the selection committees were haphazardly maintained, notes were discarded, and the process was not properly documented; and (4) the interview process of certain firms, which was a determinative factor in the ultimate decisions, was neither properly planned in its inception nor documented for the procurement files.

Of particular note, former NYPA President and CEO Richard Kessel recommended that NYPA consider the firm of Ruskin, Moscou, Faltischek, PC for a substantial contract for legal services with NYPA through an ongoing RFP process. At the same time, Kessel failed to disclose his own ongoing legal relationship with Ruskin Moscou on a personal legal matter that continued for the duration of the RFP selection process and involved a significant outstanding balance of legal fees that persisted during the course of the Inspector General's investigation, in apparent violation of Public Officer's Law and NYPA's Code of Conduct. Ruskin Moscou ultimately was awarded one of the NYPA contracts.

The Inspector General also found an apparent violation of the Public Officers Law and NYPA's Code of Conduct regarding a financial loan made by a subordinate to a superior. Specifically, the Inspector General determined that in 2009, Vice President for Public and Government Affairs Thomas DeJesu loaned Kessel \$15,000. Bank account records and testimony substantiate two \$7,500 withdrawals in November 2009 by DeJesu and two checks from Kessel to DeJesu for those same amounts dated May 15, 2010, and June 12, 2010. Neither Kessel nor DeJesu reported this loan on their Annual Statements of Financial Disclosure as required by and in violation of the Public Officers Law. Furthermore, the loan by a subordinate to a superior by itself appears to violate the Public Officers Law and NYPA's Code of Conduct.

In yet another apparent violation of the Public Officers Law and NYPA's Code of Conduct, the Inspector General determined that former NYPA Trustee Elise Cusack solicited part-time employment by NYPA in Western New York while serving as a voting member of NYPA's Board of Trustees. Specifically, Cusack had discussions with NYPA executives regarding a newly created position in the year preceding her resignation, while at the same time voting on issues relevant to Western New York and on matters presented to the Board by Kessel,

who, upon her hiring, would become her direct supervisor. By hiring Cusack, Kessel failed to appreciate fully the attendant legal and ethical ramifications.

The Inspector General also investigated whether NYPA, under former CEO Kessel, had been making charitable contributions that were unrelated to NYPA's "powers, duties or purposes," in contradiction to a 2007 Attorney General opinion addressing this exact issue. In addition, it was reported in the media that since Kessel, a long-time Long Island resident, had assumed leadership of NYPA, charitable contributions to Long Island not-for-profit entities had increased significantly, despite NYPA's limited presence in Long Island.

An analysis of the produced documents from 2009 and 2010 revealed that a sizeable number of the charitable contributions mentioned in newspaper articles and blogs were classified as business expenses by NYPA but were contributory in nature (hereinafter "business-related contributions"). The review further revealed that while NYPA has a formal written charitable contributions policy requiring layers of review and approval, NYPA lacks a formal written policy for monitoring business-related contributions. Instead, these business-related contributions are handled and approved merely at a department level. Notably, NYPA executives failed to conduct an enhanced review as the expense level increased into the thousands of dollars. It is clear, however, that charitable contributions and business-related contributions both statewide and specifically related to the Long Island area increased after Kessel assumed the position of NYPA CEO. Specifically, the number of statewide charitable contributions doubled from 2009 to 2010, and the number of statewide business-related contributions increased by more than 50 percent.

The Inspector General recommended the following remedial measures in response to the findings of this investigation. NYPA should: (1) engage in a management audit to discern weaknesses in its current policies and procedures and its management structure; (2) develop more exacting procurement standards and mandate full documentation and retention of the records; (3) redraft its RFP conflict of interest disclosure requirement to include any personal conflicts of interest, actual, potential, or perceived; (4) engage in training regarding the requirement of NYPA employees to disclose all professional and personal conflicts of interest, actual, potential, or perceived; (5) engage in training regarding the prohibition of seeking a loan from a subordinate and loaning money to a superior; (6) formulate a policy that proscribes an active Board member from seeking NYPA employment; (7) establish a formal policy that is modeled after the Contributions and Sponsorships Policy to identify and monitor the business-related contributions. Because the Inspector General found numerous apparent violations of the Public Officers Law, these findings will be forwarded to the Joint Commission on Public Ethics for review. The New York Power Authority has accepted the recommendations and taken corrective action as set forth in this report by the Inspector General.

## **II. INTRODUCTION AND BACKGROUND**

The New York Power Authority of the State of New York (NYPA) was established by the Power Authority Act of 1931. Its stated mission is to “provide clean, low-cost and reliable energy consistent with its commitment to the environment and safety, while promoting economic development and job development, energy efficiency, and renewables and innovation for the benefit of its customers and all New Yorkers.”<sup>1</sup> NYPA is the largest state power organization in the United States, comprised of 17 generating facilities and more than 1,400 circuit-miles of

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<sup>1</sup> <http://www.nypa.gov/about/mission.htm>

transmission lines. It maintains three offices throughout the state in Albany, White Plains, and Buffalo.

Pursuant to Public Authorities Law section 1003, NYPA is governed by a seven-member board of trustees. Each board member is appointed by the governor with the advice and consent of the senate for a term of five years. Other than the elected full-time chairman, NYPA Board members are not compensated. The powers and duties of NYPA's Board of Trustees are codified in New York State Public Authorities Law section 1005. According to its by-laws, NYPA's Board of Trustees is responsible for (1) overseeing the chief executive and executive management to ensure the effective and ethical management of NYPA; (2) reviewing and monitoring financial, management, and operational decisions; (3) approving, on an annual basis, the salary of the President and Chief Executive Officer and the Executive Management Committee; and (4) approving, on an annual basis, employee policies governing salary, compensation and benefits.

NYPA's day-to-day operations are performed by several non-statutory officers, including President and Chief Executive Officer, Chief Operating Officer, and Executive Vice President and General Counsel. In 2009 and 2010, the period relevant to the instant investigation, Richard Kessel held the position of President and Chief Executive Officer; Gil Quiniones held the position of Chief Operating Officer;<sup>2</sup> and Terryl Brown held the position of Executive Vice President and General Counsel. Significantly with respect to the issues discussed in this report, Kessel, upon assuming his role as President and CEO in 2008, instituted new reporting responsibilities in executive management. Specifically, Kessel directed the Legal Department,

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<sup>2</sup> Currently, Quiniones is the President and CEO of NYPA, a position to which he was elected by the NYPA Board on November 15, 2011, and confirmed by the New York State Senate on January 9, 2012. He is not implicated in the misconduct outlined below.

Corporate Communications, Public and Government Affairs, and the Finance Departments to report directly to him rather than to COO Quiniones. Only Operations directly reported to Quiniones.

### **III. INVESTIGATION**

#### **A. NYPA ENGAGES IN THREE PROCUREMENTS FOR LEGAL SERVICES**

In 2009 and 2010, NYPA engaged in three procurements for Legal Services Counsel. The Inspector General found that NYPA's process for selecting Legal Services Counsel was flawed.

##### **1. NYPA's Procurement Process**

NYPA's Guidelines for Procurement Contracts govern all NYPA Procurement Contracts for goods or services valued at \$5,000 or more, as well as Non-Procurement Contracts<sup>3</sup> and Services Contracts. The Guidelines specify three categories of Services Contracts: personal services, non-personal services, and construction. Personal services include procurement of contracts for outside legal counsel.

NYPA's Procurement Department and the requesting department are collectively responsible for soliciting a minimum number of bidders for each required service. Once the scope of work is identified, the departments will draft and make available either a Request for Proposal (RFP) or a Request for Quotation (RFQ). The minimum number of potential bidders to which the solicitation must be made available depends on the value of the contract. Services

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<sup>3</sup> NYPA's Guidelines definition of Non-Procurement Contracts includes contracts for energy, capacity, ancillary services, transmission, distribution or related services in support of providing services to NYPA customers.

valued at \$25,000 require a minimum of five bidders and the RFP or RFQ must be displayed on NYPA's Web site.<sup>4</sup> In addition, a recommended bidders list comprised of companies or firms that possess the expertise being solicited are alerted of the advertised procurement via e-mail.<sup>5</sup> NYPA sets a due date for bids or proposals no sooner than 21 calendar days after the date of publication. At the conclusion of the response period, all submitted proposals are, according to NYPA's Guidelines for Procurement Contracts, "evaluated using fair and equitable comparison[s] of all aspects of the proposals."

In accordance with New York State Finance Law section 139-f, NYPA Guidelines enforce a "restricted period" within which all communication from bidders is restricted to a designated contact person at NYPA. The restricted period "commences with the earliest written notice, advertisement or solicitation of a request for proposal soliciting a response from bidders/contractors" and ends with the final contract award. If contact is made during the restricted period with someone other than the designee, NYPA employees must create a "record of contact" and submit the caller's identifying information, affiliated entity, and reason for calling. The record of contact is submitted to the Procurement Department and is included in the procurement folder.

Approval and annual review of contracts by NYPA's Board of Trustees is required when the term of the contract is for a period greater than 12 months. In addition to Board approval,

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<sup>4</sup> In addition to display on NYPA's Web site, all procurement contracts valued at \$15,000 or more must also be submitted to the Commissioner of the New York State Department of Economic Development for display on the New York State Contract Reporter Web site, unless such posting would serve "no useful purpose".

<sup>5</sup> The recommended bidders list is formed based on the recommendations of the requesting departments.

when the total estimated contract value exceeds \$500,000, the approval of the President and Chief Executive Officer is also required.<sup>6</sup>

## **2. Requests for Proposal for Legal Services Contracts**

While NYPA employs a counsel and assistant counsels, NYPA outsources certain legal matters deemed beyond the purview or expertise of the Legal Department. NYPA contracts with numerous law firms in anticipation of requiring legal work in these outside areas, so that it can proceed efficiently when such matters arise. Accordingly, in September 2009, in anticipation of the expiration of numerous prior legal services contracts, NYPA commenced a process of procuring outside law firms to provide these legal services. The Legal Department, in conjunction with the Procurement Department, drafted Requests for Proposal for (1) Financial Services Counsel (which included the three subdivisions of Bond, Underwriter and Disclosure Counsel), (2) Energy Services Counsel, and (3) General Legal Services Counsel. The responses for Bond, Underwriter and Disclosure Counsel were solicited on September 7, 2009, and for Energy Services Counsel and General Legal Services Counsel on February 4, 2010.

The RFPs were drafted in accordance with the requirements set forth by NYPA Guidelines for Procurement Contracts. Firms were required to submit information supporting their ability to perform the contract requirements, including management and qualifications, diversity and equal employment opportunity, and cost. Relevant to the instant investigation, the RFPs required firms to include in their responses “the identification and nature of any potential conflict of interest, actual or perceived, which exists or may arise in providing legal counsel services to the Authority.”

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<sup>6</sup> According to NYPA’s Expenditure Authorization Procedures and Guidelines for Procurement Contracts, in addition to Board of Trustee Approval, where the value of a personal services contract exceeds \$1 million if low bidder, or \$500,000 if sole-source or non-low bidder, interim approval must be obtained from the President and Chief Executive Officer or Chief Operating Officer or equivalent(s) or designee.

In anticipation of its release, as per NYPA Guidelines, a recommended bidders list was compiled that included 25 firms. Twelve firms responded to the Bond, Underwriter and Disclosure Counsel RFP, 19 firms responded to the Energy Services RFP, and 32 firms responded to the General Legal Services RFP. Of note, Ruskin Moscou Faltischek, PC submitted responses to all three RFPs.

Executive Vice President and General Counsel Terry Brown then formed committees of attorneys from NYPA's Legal Department to evaluate the responses to each of the three RFPs. Six criteria were used to evaluate the Bond, Underwriter and Disclosure Counsel RFP responses and five criteria were used to evaluate the General Legal Services RFP and Energy Legal Services Counsel RFP responses. A score was assigned to each response and then ranked among the competing proposals. Based on this evaluation process, each committee recommended the best candidates for each legal service category to Brown.

*The Bond, Underwriter and Disclosure Counsel*

The Bond, Underwriter and Disclosure Counsel committee of two attorneys and one Finance Department employee was the first to perform its evaluation. The committee utilized a matrix of six categories with which to evaluate the 12 bidders. Every committee member evaluated the responses and ranked the 12 firms. The committee then convened and formulated a consensus as to the ranking of the 12 firms for presentation to Brown. Brown then met with the committee to discuss the recommendations. Based upon documentary and testimonial evidence, the committee recommended a total of six firms to Brown – one firm to serve as Bond Counsel, one firm to serve as Disclosure Counsel, and four firms to serve as Underwriter Counsel. Ultimately, Brown selected Gonzalez, Saggio & Harlan LLP and Hawkins Delafield &

Wood LLP for Bond Counsel; Nixon, Peabody, LLP and Orrick Herrington & Sutcliffe LLP for Disclosure Counsel; and Fulbright & Jaworski LLP, Gonzalez, Saggio & Harlan LLP and Orrick Herrington & Sutcliffe LLP for Underwriter Counsel. In accordance with the RFP process, Brown then sought approval of the selected firms from both Kessel and the NYPA Board. Kessel recommended approval, and the Board approved all the contracts.

*General Legal Services and Energy Legal Services Counsel*

Brown formed a General Legal Services Counsel committee of two attorneys to evaluate the 30 bidders for the General Services Counsel contracts and an Energy Legal Services Counsel committee of one attorney to evaluate the 19 bidders for the Energy Legal Services contracts. A similar scoring matrix of five criteria was used for both RFP processes. In contrast to the Bond, Underwriter and Disclosure Counsel evaluation process, in which each committee member reviewed the submission of every bidder, the General Legal Services Counsel committee divided the bidders into two groups and, as noted, the Energy Legal Counsel Services committee had only one member. Therefore, in the General Legal Services Counsel and Energy Legal Services Counsel evaluations, no comparison of the rankings among committee members was possible.

Brown testified that, when the rankings for General Legal Services and Energy Legal Services were submitted to her, she was not satisfied with the methodology employed in these evaluation processes:

[I] believe part of the reason for having a team do anything is that you get feedback from one another and insight from one another about . . . what you thought about you read a particular thing or your interpretation of what somebody might have said at a meeting. For me it defeated the purpose of just having

people work individually. I don't think you get the best assessment or evaluation doing it that way.<sup>7</sup>

As a result, Brown disregarded those rankings, and other Legal Department attorneys were assigned to review the bidders' submissions. Instead, the staff members testified to the Inspector General that they considered, among other things, their past experiences with those firms, the geographical locations of the firms, and cost. They did not formulate a ranking. The staff members then scheduled interviews of 10 firms with which they did not have previous experience. No documentation of these interviews was produced to the Inspector General. Certain interviewers testified to the Inspector General that they took personal handwritten notes of the interviews; however, these notes were never formalized for retention in the procurement files and were discarded following the selection process.

The following firms were awarded General Legal Services contracts: Holland & Knight LLP; Carter, Ledyard & Milburn LLP; Whiteman, Osterman & Hanna LLP; Schoeman Updike & Kaufman LLP; Nixon Peabody LLP; Ruskin Moscou Faltischek, PC; Rivkin Radler LLP; Hiscock & Barclay LLP; and Reisman, Peirez & Reisman LLP. The following firms were awarded Energy Legal Services Contracts: Nixon Peabody LLP; Ruskin Moscou Faltischek, PC; Holland & Knight LLP; Van Ness Feldman, PC; Troutman Sanders LLP; Mercer Thompson LLC; and Fulbright & Jaworski LLP.

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<sup>7</sup> While Brown was critical of these evaluation processes, several members of these two evaluation committees testified to their frustration with what they deemed was Brown's failure to provide guidance as to how the evaluation process should be implemented or conducted.

**3. Former NYPA President/CEO Richard Kessel Fails to Disclose Conflict of Interest Regarding Ruskin Moscou Faltischek, PC**

Richard Kessel became President and CEO of NYPA effective October 14, 2008, a position he held until he resigned the position in September 2011. As President and CEO, Kessel reported directly to NYPA's Board of Trustees. His primary responsibility was the administration of NYPA's day-to-day operations.

As noted earlier, NYPA's Guidelines for Procurement Contracts require the approval of the President/CEO when the total estimated contract value exceeds \$500,000. The three Legal Services RFPs each exceeded this monetary threshold and thus required Kessel's approval. Nevertheless, according to Brown and Chairman of the Board Michael Townsend, Kessel never disclosed any actual, potential, or perceived personal conflicts of interest with respect to any of the responding firms, other than that some of the recommended firms had done legal work for the Long Island Power Authority (LIPA) when he was its chairman.<sup>8</sup> Of note, this disclosure is evidence of Kessel's knowledge of the requirement to reveal any conflicts of interest to the Board.

The RFP selection process for the three areas of legal services took many months to complete. As detailed above, the Legal Department conducted interviews to assist in its selections. A staff member testified to recalling a conversation with Brown during the interview process in which Brown conveyed direction from Kessel regarding firms that should be

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<sup>8</sup> May 26, 2010 NYPA Board meeting minutes reflect that Kessel, while presenting the selections for the three Legal Services procurements "said that in the interest of full disclosure, several of the law firms being recommended for contracts in item 1e (Request for Proposal for Legal Services) had done work for the Long Island Power Authority ('LIPA') when he had been there."

considered or were preferred<sup>9</sup>. According to the Legal Department staff member, one firm that Kessel stressed should be considered is Reisman Peirez & Reisman LLP. When queried about this firm, Kessel testified to the Inspector General that he and David Peirez have known each other for 30 years. Reisman Peirez & Reisman LLP participated in the NYPA RFP process for General Legal Services and was awarded a contract as General Legal Services Counsel. According to the same Legal Department staff member, the other firm that Kessel suggested for consideration was Ruskin Moscou Faltischek, PC.

Ruskin Moscou Faltischek, PC is a multi-disciplinary law firm based in Long Island, New York. According to the Deputy General Counsel to NYPA, prior to the Legal Services RFP period, Kessel forwarded to Brown a letter from Ruskin Moscou addressed to Kessel discussing the services it could provide and seeking to be retained by NYPA. Kessel had added on the letter a note to Brown saying “consider talking to these folks.” On March 4, 2009, Ruskin Moscou had a “courtesy interview” with NYPA’s Legal Department, even though NYPA was not seeking legal counsel at that time. According to the Deputy General Counsel, the interview was granted at the sole direction of Kessel. The Deputy General Counsel related to the Inspector General his impression of the interview:

We talked about the possibility of what services they could provide that we would be interested in. And I think we sort of agreed that they would probably be effectively Long Island based services rather than dealing with energy issues for which we had plenty of other people. Or issues dealing with more generalized business things like finance. So if we had a transaction that dealt with Long Island real estate, if we had a litigation that dealt with Long Island real estate, that was somebody we would consider but outside of that, I didn’t, we didn’t think they brought too much to the table with respect to our business, our core business.

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<sup>9</sup> Brown testified to the Inspector General that Kessel did instruct her to ensure that certain firms received notification of the RFPs.

Importantly, Kessel retained Ruskin Moscou for legal services regarding a personal matter by retainer letter dated March 3, 2009, one day prior to the firm's courtesy interview with NYPA. In September 2009 and February 2010, NYPA proceeded with its RFP process, and Ruskin Moscou submitted responses to all three RFPs. Ultimately, the firm was awarded contracts as both Energy Services and General Legal Services Counsel.

As noted earlier, after the formal rankings were discarded in the Energy Services Counsel and General Legal Services Counsel procurements, other Legal Department attorneys were assigned to review the bidders' submissions. The staff members then scheduled interviews of 10 firms with which they did not have previous experience. Wendy Lane, former Assistant General Counsel at NYPA who participated in the procurement and interview process, explained that she was told to include certain firms in the review process:

**Inspector General:** During this process or before the process, before your involvement, were you told in any way that certain firms need to be included?

**Lane:** I was – I'm focusing on need to be included – I was under the impression that yes there were certain firms that needed to be in the process. I never, I didn't question what does that mean. Does that mean they must be given a contract, does that mean they must be given an interview, but yes I was under the understanding that some firms had to be considered.

**Inspector General:** And how did you gain that understanding?

**Lane:** It would have been from Terry1 [Brown]. And it would have been her saying an impression that she had from Richie [Kessel].

**Inspector General:** Do you recall the conversation with Terry1?

**Lane:** I, you know I've been wracking my brains, I don't. I was just under the impression that there were some firms that either he had worked with before and had a good experience with, you know so – he clearly had to be – the

sense I had that there were some firms that had to be considered.

**Inspector General:** And do you recall what firms those were?

**Lane:** Not all of them, or it – my memory is not complete alright, but this, this may be all of them. Whatever firm Kremer is with, I don't know if his first name is Arthur. He's an old politician of some sort. Kremer sounds familiar. Reisman, which may or may not be the same firm I don't know, sounds familiar . . . .

**Inspector General:** Any other firms that you remember?

**Lane:** Not with certainty. Not with certainty.

**Inspector General:** Was Ruskin Moscou –

**Lane:** Yes, that, that feels familiar, yes.

**Inspector General:** Is that one of the ones who –

**Lane:** I – yes, yes –

**Inspector General:** included in that category

**Lane:** Included in that category.

As a NYPA employee, Kessel is subject to the Public Officers Law. Public Officers Law section 74 is entitled, "Code of Ethics," and sets forth the minimum standards state employees must meet when carrying out their official duties. Specifically, section 74(3)(h) mandates that a state employee "should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust." NYPA employees, upon commencement of employment, must certify receipt and review of this section and others of the Public Officers Law and that they "undertake to conform to the provisions, purposes and intent of these sections and to the norms of conduct for officers and employees of state agencies." Kessel signed this attestation.

Further, NYPA's Code of Conduct, modeled after the Public Officers Law, directs its personnel to:

Conduct themselves at all times in a manner that avoids any appearance of or situation where they could be either improperly influenced, give or be given preferential treatment to or by any person or entity or act in violation of the public trust.

As with the Public Officers Law, all NYPA employees must certify, upon commencement of employment, that they have read the NYPA Code of Conduct and “undertake to conform to the intent and provisions of the Code.” Kessel signed this attestation as well.

Kessel failed to disclose his personal legal relationship with Ruskin Moscou despite the fact that the procurement process required his approval for the contract to be finalized. Kessel’s failure to disclose appears to violate both section 74 of the Public Officers Law and NYPA’s Code of Conduct. Brown, when confronted with the details of Kessel’s apparent conflict of interest, revealed that she would have expected such information to be divulged:

**Inspector General:** Did [Kessel] disclose to you that Ruskin Moscou was actually doing legal work for him that involved [a personal estate matter].

**Brown:** No.

**Inspector General:** Would that have been something that . . . being that Ruskin Moscou had applied for an RFP with NYPA, is that something that he should have filed or made aware, based under the Code of Ethics [and the] Public Officers Law, that he should have disclosed to maybe the Ethics Officer.

**Brown:** I would say if that was the case, yes.

**Inspector General:** And do you recall him disclosing that?

**Brown:** No.

Similarly, Chairman of the Board Townsend stated that Kessel’s ongoing legal relationship with Ruskin Moscou was “material” and “clearly” something he should have reported. Importantly,

Kessel had an outstanding bill of over \$25,000 with Ruskin Moscou during the course of the Inspector General's investigation.<sup>10</sup>

**B. Conflict of Interest Regarding a Personal Loan Made by NYPA Vice President Thomas DeJesu to Former President/CEO Richard Kessel**

On February 9, 2009, Kessel hired Thomas DeJesu as Vice President for Public and Government Affairs. At the time he was hired, DeJesu and Kessel had known each other for more than 20 years. When interviewed by the Inspector General, DeJesu, who lives in the same town on Long Island as Kessel, described his relationship with Kessel as a longstanding personal friendship.

In or about November 2009, while Kessel was DeJesu's direct supervisor, Kessel borrowed money from DeJesu. When interviewed by the Inspector General, DeJesu testified that Kessel had confessed financial difficulties, "that he needed the money and he couldn't come to anyone [else]." DeJesu responded by loaning him money. The Inspector General determined that on November 23 and 30, 2009, DeJesu twice withdrew \$7,500 from a personal bank account and gave \$15,000 to Kessel. DeJesu did not charge Kessel any interest on the \$15,000 loan.

In his testimony to the Inspector General, DeJesu speculated that the loan "occurred when Kessel was in between jobs." However, further investigation revealed that Kessel was President and CEO of NYPA and DeJesu's supervisor at the time DeJesu loaned him the \$15,000. On May 15 and June 12, 2010, Kessel repaid the loan to DeJesu in two \$7,500 checks.

As with his lack of disclosure during the Legal Services procurement discussed above, Kessel's conduct in the solicitation and acceptance of a loan from his subordinate appears to

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<sup>10</sup> Ruskin Moscou did not disclose the prior relationship with Kessel despite a clause in the three RFP applications requiring such information.

violate NYPA's Code of Conduct. By requesting and accepting the loan, Kessel created an "appearance or situation where [he] could be either improperly influenced [or] give or be given preferential treatment."

DeJesu's loan to Kessel also appears to violate the Public Officers Law. Similar to NYPA's Code of Conduct, Public Officers Law section 74(3)(h) also proscribes the conduct described above. In requesting and accepting this loan, Kessel also appears to have violated Section 74(d) of the Public Officers Law, which states, that no state officer or employee should "use or attempt to use his official position to secure unwarranted privileges for himself or others." While the Inspector General acknowledges the friendship between Kessel and DeJesu, the more prudent course of action would have been not to seek or accept a loan from a subordinate.

Furthermore, Kessel and DeJesu both submitted inaccurate Annual Statements of Financial Disclosure under section 73-a of the Public Officers Law. Specifically, question 18 of the Annual Statement of Financial Disclosure required the disclosure of any notes or other debts in excess of \$1,000. Question 19, as structured during the relevant year, required the disclosure of any liabilities in excess of \$5,000. As such, pursuant to the Public Officers Law, both DeJesu and Kessel were required to report this loan. A review of both Kessel's and DeJesu's Annual Statements of Financial Disclosure revealed that neither reported the \$15,000 loan, in violation of the Public Officers Law.

**C. ELISE CUSACK SOUGHT PAID EMPLOYMENT WITH NYPA WHILE SERVING ON NYPA'S BOARD IN APPARENT VIOLATION OF THE PUBLIC OFFICERS LAW AND NYPA'S CODE OF CONDUCT**

Elise Cusack was appointed to the NYPA Board of Trustees in June 2005. At the time of her appointment, Cusack was a resident of Western New York and served as a member of the Erie County Legislature. On March 29, 2010, Cusack resigned her Board position and began part-time employment at NYPA's Buffalo office the next day in the newly-created position of Community Liaison for the Erie Canal Harbor and Other Special Projects at an annual salary of \$77,500. On May 11, 2010, the Inspector General received a complaint that Cusack's securing a paid position with NYPA immediately after resigning her Board position violated NYPA's Code of Conduct. Cusack resigned from her NYPA job in September 2011.

**1. Cusack Improperly Sought Paid Employment With NYPA While Serving On NYPA's Board**

The Inspector General determined that beginning in or about March 2009, Cusack separately contacted President/CEO Kessel and then Chief Operating Officer Gil Quiniones about obtaining paid employment at NYPA. In addition, Cusack testified that she discussed the matter with Board of Trustees Chairman Michael Townsend. While Townsend stated that he did not recall a conversation with Cusack, he admitted to knowing that she was looking for a paid position because Kessel had brought the matter to his attention. Quiniones recalled Cusack broaching the subject of obtaining paid employment at NYPA with him. However, Quiniones was no longer involved in hiring employees at NYPA. As such, according to Quiniones, he suggested that Cusack speak to Kessel about the matter. Quiniones testified that he heard nothing else on the subject until he learned of Cusack's hire on March 30, 2010.

The Inspector General determined that Cusack initially sought and was considered for paid employment with NYPA while simultaneously holding her Board position. Kessel testified that in late 2009 or early 2010, he requested a legal opinion from NYPA General Counsel Terryl Brown. In a memorandum dated January 31, 2010, NYPA's Legal Department addressed the question of whether Cusack could simultaneously hold a Board position and serve as a NYPA employee, and cautioned, "one can imagine situations where Ms. Cusack would be presented with potential conflicts of interest in discharging her Trustee duties, particularly where she is asked to take action on issues that could benefit her as a NYPA employee." The memorandum concluded with a warning: "[G]iven the focus on public authority accountability . . . the concern should not be ignored and the issue may need to be addressed if Ms. Cusack's situation draws attention." Brown testified that she was not aware that Cusack was planning on leaving the Board nor did she recall being part of any discussions regarding Cusack stepping down from the Board. Therefore, Brown had directed a staff attorney to draft a legal memorandum discussing the propriety of maintaining Board membership while employed at NYPA, but did not ask that the memorandum address the propriety of Cusack actively seeking paid employment while serving on the Board, or holding a paid position immediately after leaving the Board – the two issues relevant to these circumstances. Nor did the staff attorney independently broaden the scope of the memorandum to identify additional issues for Brown's consideration. Once Brown learned of Cusack's actual intentions and actions, it would have been prudent for Brown to have identified potential concerns with the Board and to have sought a revised legal assessment.

In his testimony to the Inspector General, Townsend expressed no concern about NYPA hiring Cusack, which he deemed to be within Kessel's authority. Townsend also stated that he was not provided the Legal Department's memorandum on the issue of Cusack's dual service,

although the hiring of Cusack as a paid NYPA employee did not require Board approval for consideration. In addition, at no time did Kessel, Cusack, or any other NYPA official seek guidance from the New York State Commission on Public Integrity (COPI) on this issue, even though COPI routinely provided advisory opinions on ethical issues.

Kessel told the Inspector General that he also advised the Appointment Office of then Governor Paterson that he was considering hiring Cusack. The Inspector General inquired of Francine James, who held the position of Appointment Secretary during portions of the relevant period. James said she had no recollection of being asked about Cusack's hiring. Kessel's additional claims of contact with the Appointment Office could not be corroborated.

## **2. Cusack's Actions Appear to Have Violated the Public Officers Law and NYPA's Code of Conduct**

Cusack's hiring raises serious ethics issues with respect to the New York State Public Officers Law and NYPA's Code of Conduct. Public Officers Law section 74 sets forth the Public Officers Code of Ethics. Section 74(3)(d) prohibits state officers or employees from the "use or attempt[ed] use [of] his or her official position to secure unwarranted privileges . . . for himself or herself." Moreover, Public Officers Law section 74(3)(h) prohibits public officers from engaging in conduct which would "give [a] reasonable basis for the impression that any person can improperly influence him" or which would raise suspicion among the public that the acts engaged in violate the public's trust. The NYPA Code of Conduct, which incorporates much of the language of section 74 of the Public Officers Law, also specifically includes the proscription against employee "use [of] their official position to secure unwarranted privileges for themselves . . . including contracts and employment within [the Power Authority]" and "any

appearance of or situation where they could be . . . improperly influenced, give or be given preferential treatment.”

The Inspector General determined that Cusack, while actively seeking paid employment at NYPA’s Buffalo office in Western New York, never abstained from voting on any matters brought before the Board. Specifically, from March 2009 until March 2010, more than 85 voting matters were brought before the Board, many of which included matters relevant to Western New York. As a voting Board member, Cusack was in the position to persuade the Board to invest in Western New York projects. Notably, in seeking a paid position with NYPA through Kessel, Cusack was applying for employment to an official whose conduct she oversaw as a NYPA Board member. Cusack never formally notified the Board of her employment negotiations or recused herself from any vote pending before the Board. When questioned by the Inspector General about whether she ever recused herself from voting on a particular matter, Cusack responded “the thought never crossed my mind.” Cusack’s conduct in securing a job with NYPA while actively engaged in Board matters created at best an appearance of impropriety.

**D. CONTRIBUTIONS AND “BUSINESS-RELATED CONTRIBUTIONS” AT NYPA**

In February 2011, the Inspector General commenced an investigation into whether NYPA, under former CEO Richard Kessel, had been making charitable contributions that were unrelated to NYPA’s “powers, duties or purposes,” a practice deemed prohibited by a 2007 Attorney General opinion addressing this exact issue. In addition, it was reported in the media that since Kessel, a long-time Long Island resident, had assumed leadership of NYPA, its

charitable contributions to Long Island not-for-profit entities had increased significantly, despite NYPA's limited presence in Long Island.

The Inspector General requested and received NYPA charitable contributions, sponsorships, donations, and grants for the calendar years 2009 and 2010. This document production also included NYPA's Contributions and Sponsorships Policy. When the Inspector General reviewed the items produced as contributions, it became apparent that some contributions had undergone a review and approval process consistent with the aforementioned Contributions and Sponsorships Policy, while the majority of the so-called contributions had been subject to minimal review and only on a department level. When confronted with this disparate treatment, NYPA employees explained in their testimony that NYPA classified these minimally reviewed items as "business expenses," even though they appeared to be contributory in nature and unlike other business expenses. To distinguish these hybrid business expenses/contributions from pure business expenses, the Inspector General has referred to them throughout this report as "business-related contributions".

The review also revealed that while NYPA has a documented charitable contributions policy with layers of review and approval, NYPA lacks a formal written policy for monitoring these business-related contributions. Instead, business-related contributions are handled and approved merely at a department level, thereby evading significantly more extensive and centralized scrutiny for propriety. Notably, NYPA executives failed to conduct an enhanced review even as the expense level increased into the thousands of dollars.

It is clear that charitable contributions and these business-related contributions both state-wide and specifically related to the Long Island area increased after Kessel assumed the position

of NYPA CEO. Specifically, Kessel commenced employment with NYPA in October 2008. In 2009, Kessel's first full year as NYPA CEO, NYPA made 22 charitable contributions (as defined under its Contributions and Sponsorships Policy) totaling \$245,100 across the State of New York. None of those contributions was made to any Long Island not-for-profit. In this same year, NYPA incurred 110 business-related contributions totaling \$189,101 state-wide, ten of which were to Long Island entities. In 2010, however, NYPA's charitable contributions and business-related contributions increased again. In 2010, NYPA made 45 charitable contributions totaling \$351,395 state-wide, four of which were made to Long Island not-for-profits. In this same year, NYPA incurred 182 business-related contributions totaling \$394,255 statewide, 31 of which were made to Long Island not-for-profits. It appears that this significant increase in business-related contributions was due at least in part to the lack of policy and any system of checks and balances at NYPA under Kessel's leadership.

### **1. NYPA's Contributions and Sponsorships Policies**

In September 1995, NYPA established a corporate policy with regard to giving contributions and sponsorships to entities outside of NYPA. Originally entitled "Community Support" Policy, the policy has undergone a total of seven revisions since its inception and is now entitled the "Contributions and Sponsorships" Policy. The policy was last revised on February 19, 2009, during Kessel's tenure as NYPA CEO.

This most recent version allows NYPA to provide support to various organizations for purposes related to NYPA's mission, and may take the form of a sponsorship or a financial contribution to community not-for-profit organizations and state and local governmental units which conduct a variety of projects, programs and activities in the following categories:

- Economic Development
- Energy Services
- Emergency Services
- Community, Local and State Government
- State Assistance

The Contributions and Sponsorships policy requires that any entity seeking financial support from NYPA must complete a “Support Application” form, available on NYPA’s Web site, and submit it to NYPA’s Office of Public and Governmental Affairs. This application requires basic information about the entity, the type of request, which of the five permissible categories listed above were applicable, and a written purpose of the request. In addition, the entity must submit extensive documentation, including an itemized list of expected expenditures showing dates and purpose including payees for the support requested; the organization’s current year operating budget, including income and expenses; a listing of current board members and senior management; and the most recent audited financial statement or appropriate substitute as approved by NYPA.

The Support Application is first reviewed for completeness by the Senior Vice President of Public and Governmental Affairs. Once he or she reviews the Support Application and confirms it is complete, it is forwarded to NYPA’s Legal Department. The Legal Department then reviews the application to ensure that the request meets the criteria for contributions/sponsorships as established by NYPA policy and that the purpose of the funds relates to NYPA’s mission. Once satisfied that all criteria are met, a Legal Department representative signs the application and forwards it to NYPA’s Chief Executive Officer for final approval.

As noted earlier, in 2009, NYPA did not contribute to any Long Island organizations under its defined Contributions and Sponsorships Policy. In 2010, NYPA made four contributions to Long Island under that policy totaling \$42,675: \$2,500 to Hofstra University; \$25,000 to the Long Island Pine Barrens Society; \$10,000 to the Renewable Energy of Long Island; and \$5,175 to the Research Foundation at SUNY Stony Brook. These four contributions, totaling \$42,675, represented a 12 percent share of the total state-wide contributions of \$351,395 made by NYPA in 2010.

The Inspector General interviewed the NYPA signatories involved in the Contributions and Sponsorships policy review and approval process for charitable contributions made by NYPA in the years 2009 and 2010. These signatories are, for the majority of the examined period, longtime NYPA employees who preceded Kessel's tenure. No one reported that Kessel, or any NYPA employee, ever instructed or requested that an application be approved. Moreover, those interviewed stated that Kessel never flagged an application. Kessel readily admitted that he routinely received requests for charitable contributions and always advised the organization to complete NYPA's Support Application for full review. The Inspector General did not find any undue influence with regard to the contributions made to Long Island organizations. Rather, ample documentation supports that all contributions from around the state were subject to the same process delineated above; that Kessel only had final approval of the contributions; and that the review and approval process was completed in each case where a contribution was made.

## **2. Items Deemed Business Expenses by NYPA**

Unlike the NYPA Contributions and Sponsorships policy, no multi-level, formal review and approval process exists at NYPA to monitor business-related contributions. While the

Contributions and Sponsorships policy requires a review by the NYPA Legal Department to ensure that all contributions made are consistent with NYPA's mission before being issued, business-related contributions incurred by NYPA have no such safeguard. This lack of formal policy is particularly troubling in that the business-related contributions at issue herein are contributory in nature, and are often made to similar, if not the same, not-for-profit entities as those under the Contributions and Sponsorships policy. While contributions require an application and are subject to a review and approval process, the review and approval of these business-related contributions occurs on the department level at local NYPA offices, includes less scrutiny and requires limited documentation.

The Inspector General was unable to determine, with certainty, how NYPA distinguishes between a contribution and what it deems a business expense. A consensus of those NYPA staff interviewed vaguely defined a contribution as involving a donation to an organization related to NYPA's "powers, duties or purposes," while a business expense was defined as contributory in nature but benefiting NYPA in some way. For example, if a NYPA employee were to attend a lecture at a not-for-profit organization discussing environmental issues, such fee would be classified by NYPA as a business expense and not a contribution. Kessel was asked by the Inspector General to describe the difference between a contribution and a business expense. Underscoring NYPA's lax accounting, Kessel stated that no clear distinction exists and that most could be categorized either way:

In the end it's all the same money. It's all fungible. With a \$5,000 in business expense or the \$5,000 in contributions, is \$5,000 from the Power Authority and for the rate payers of the Power Authority. And while I know, and I understand that you know there are different budget codes and all this stuff, I don't really get caught up in that because it's the same money. If it's a, if it's a legitimate purpose as a business expense or as a donation, I'm not sure that I would get into

the nitty gritty of which one is which. I understand the difference as I understand it but I could take ten of those things and argue on seven of them, both sides.

In 2009, NYPA incurred 110 business-related contributions totaling \$189,101 state-wide. Of those, 10 expenditures totaling \$25,300 were related to Long Island. This figure represents a 13 percent monetary share of NYPA's business-related contributions made in that year. In 2010, NYPA incurred 182 business-related contributions totaling \$394,255 statewide. Of those, 31 expenditures totaling \$103,151 were related to Long Island. This figure represents a 26 percent monetary share of NYPA business-related contributions made in that year.

An analysis of these figures demonstrates a clear increase in business-related contributions from 2009 to 2010, both statewide and dramatically in Long Island. When questioned by the Inspector General with regard to this clear increase in business-related contributions in the Long Island area, Kessel asserted:

We do a lot of business with the Long Island Power Authority. And I'm a Long Islander. . . . When I look at the overall number – again – you know now I didn't count every dollar. Compared to what we give upstate, Long Island gets a pittance. But I'm a Long Island guy. I live there. And I think it's, I think it's appropriate. . . . I think it's natural. I think if the, if the head of the Power Authority were from, you know I don't know, Schenectady, you'd see more from Schenectady.

The Inspector General does not dispute that NYPA has some business presence in Long Island. However, the significant rise in percentages of NYPA's business-related contributions incurred in Long Island (rising from 13 percent in 2009 to 26 percent in 2010) gives cause for concern. The Inspector General reviewed NYPA's business-related contributions for the years 2009 and 2010, including those made in Long Island, and found limited documentation for each business-related contribution. The documentation did not always reveal the purpose and scope of the business-related contribution, and often did not detail the nexus to NYPA's mission statement as an authority. Most notably, it appears that the business-related contributions

underwent minimal review. Certainly, NYPA has no formal policy requiring a written justification for payment prior to issuing these business-related contributions. The lack of any substantive documentation rendered analysis by the Inspector General difficult. In turn, the Inspector General is unable to conclude with certainty whether all business-related contributions were appropriate under NYPA's mission.

For example:

- In 2009, NYPA paid \$3,400 to the New York Building Congress to reserve eight seats to attend an event labeled as a "luncheon." While the documentation provided by NYPA relevant to this event indicates that the New York Building Congress energy committee focuses on energy issues and the need for additional electric generating capacity and enhanced conservation programs, no specific details of the program that was to be presented on this occasion were provided; neither was a justification provided as to why it was important for NYPA employees to attend, who from NYPA went, or who authorized the expense.
- In 2009, NYPA paid \$1,500 to the Long Island Housing Partnership, Inc., to reserve 10 seats at the annual chairman's symposium. No justification was provided in the documentation as to why it was important for NYPA to attend, or how it related to NYPA's mission.
- In 2010, NYPA paid \$2,500 for membership dues to the Association for a Better New York. No justification was presented in the NYPA documents to demonstrate the importance of membership to NYPA.

When questioned by the Inspector General concerning business-related contributions in general and the lack of any formal policy, Kessel stated that he trusts the judgment of his "people" to make decisions as to these business-related contributions. While trust in subordinates is one factor in a review process, proper and accountable administration of an authority requires checks and balances. NYPA cannot continue to remit monies for these business-related contributions with only minimal review.

The need for formal review becomes apparent upon review of NYPA's business-related contributions to various chambers of commerce. For instance, when confronted specifically

about the business-related contribution to the Massena Chamber of Commerce, Kessel stated that NYPA classified this expenditure as a business expense because one of NYPA's two biggest generating plants is located in Massena. NYPA participates in business activities run by that Chamber of Commerce, and Kessel speaks before their members. Kessel considered this to be a business expense as part of running NYPA's St. Lawrence County project.

In contrast to the seemingly proper business-related contributions to the Massena Chamber of Commerce, the propriety of business-related contributions to the Merrick Chamber of Commerce is less apparent. The Inspector General determined that in 2009 and 2010, NYPA made payments totaling \$14,175, classified as business expenses, to the Merrick Chamber of Commerce in Long Island. Review of documentation provided by NYPA indicated that these payments were made in support of a membership with the chamber and NYPA's participation in fall street festivals run by the chamber in 2009, 2010 and 2011. Records indicate that NYPA had not been a member of the Merrick Chamber of Commerce prior to Kessel joining NYPA. Contrary to Kessel's statements with regard to NYPA's business relationship with the Massena Chamber of Commerce, NYPA does not operate any generating plants in Merrick and operates no specific power projects there as it does in St. Lawrence County. No indication exists in the records provided by NYPA that these expenditures to the Merrick Chamber of Commerce were reviewed by any executive staff at NYPA, including the Legal Department, to determine if they were appropriate under NYPA's mission statement.

Additional review conducted by the Inspector General determined that in 2009, NYPA gave money to 26 chambers of commerce across the state and to 25 chambers of commerce in 2010. Several NYPA employees, including Kessel, emphasized in their testimony before the Inspector General, that NYPA is a state authority, but it also functions as a business that must

compete in the marketplace and continually re-sign old customers and generate new ones. To that end, NYPA must engage itself among communities across the state to meet business owners and generate business. While the Inspector General recognizes the practicality of the issue for NYPA, NYPA must also acknowledge that it is first and foremost a New York State Authority. Clear and concise rules and regulations with respect to reviewing, approving and issuing appropriate contributions and business-related contributions need to be instituted to ensure that NYPA money is being spent wisely and only in direct relation to its mission.

### **3. Questions Regarding a \$10,000 Donation by ALCOA to the Pine Barrens**

In October 2009, the Long Island Pine Barrens Association honored then NYPA CEO Kessel and then Governor David A. Paterson. In or about the same time frame, the Pine Barrens submitted a Support Application to NYPA for a \$25,000 contribution. The support application was not processed and no contribution was made by NYPA to the Pine Barrens in 2009.<sup>11</sup> Also in 2009, ALCOA, an integrated aluminum company, donated \$10,000 from the ALCOA Foundation to the Pine Barrens by purchasing an ad in the Pine Barrens dinner journal.

The Inspector General became aware of an allegation that this \$10,000 donation might have been garnered by Kessel for the Pine Barrens in return for honoring him. However, NYPA has long provided power to ALCOA's plant in Massena, New York. In January 2008, prior to Kessel's employment at NYPA, NYPA's Board voted to approve an agreement in principle to continue power allocations to ALCOA. In January 2009, a 30-year contract was formally

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<sup>11</sup> Of note, the Pine Barrens re-submitted a Support Application in 2010, and NYPA contributed \$25,000 to the Pine Barrens that same year. This contribution was subjected to NYPA's formal Contributions and Sponsorship policy review and approval process as described earlier.

approved between ALCOA and NYPA because the then-current contract was due to expire in 2013. At that point, Kessel had been NYPA CEO for three months.

Further questions were raised as to why ALCOA, which is based in Massena, New York, would donate to the Pine Barrens located in Long Island. ALCOA and its foundation, however, both have offices in New York City. Kessel denied ever having asked anyone at ALCOA for a donation to the Pine Barrens because he was being honored. In addition, ALCOA executives interviewed by the Inspector General reported that no one from NYPA solicited a donation from the ALCOA Foundation on behalf of the Pine Barrens. ALCOA executives described a donation to an organization dedicated to environmental education and advocacy and which was honoring the Governor of the State of New York and the CEO of NYPA as well within the mandate of the ALCOA Foundation with assets valued at \$400 million.

#### **IV. FINDINGS AND RECOMMENDATIONS**

The Inspector General's investigation identified substantial weaknesses in NYPA's policies and procedures which resulted in several apparent violations of the New York State Public Officers Law and NYPA's Code of Conduct. Accordingly, as the Inspector General recommended, NYPA has engaged an independent management audit to discern weaknesses in its current policies and processes and its management structure.

The Inspector General found that NYPA's process for selecting Legal Services Counsel lacked necessary procedures and was deficient. Specifically, NYPA's initial evaluation process for selecting firms for the three Legal Services RFPs lacked uniformity and was rife with problems. Reviewers for the General Legal Services and Energy Legal Services procurements were inexperienced in conducting analysis and review. Documents generated by the selection

committees were haphazardly maintained, notes were discarded, and the process was not properly documented. Most significantly, the interviews of certain firms, a determinative factor in the ultimate decision making process, was neither properly planned in its inception nor documented for the procurement files. Accordingly, the Inspector General recommended that NYPA develop more exacting procurement standards and mandate full documentation and retention of the records. NYPA will revise said procurement standards within 90 days after completion of the independent management audit.

The Inspector General further determined that former NYPA President and CEO Richard Kessel appears to have violated the New York State Public Officers Law and NYPA's Code of Conduct. Kessel failed to disclose an ongoing personal legal relationship he had with Ruskin Moscou Faltischek, PC, which responded to and was awarded Legal Services Counsel contracts. Specifically, the Inspector General found that Kessel failed to disclose a legal relationship with Ruskin Moscou, which he had retained to represent him in an ongoing personal legal matter that continued for the duration of the selection process and involved a significant outstanding balance in legal fees that persists to date.

The Inspector General recommended NYPA redraft its RFP conflict of interest disclosure requirement to include any personal conflicts of interest, actual, potential or perceived. NYPA will revise its third party conflict of interest disclosure requirement within 90 days after completion of the independent management audit.

As the Inspector General further recommended, NYPA has undertaken training of its trustees and employees regarding the requirement that NYPA employees disclose all

professional and personal conflicts of interest, actual, potential or perceived, and to recuse themselves where appropriate.

The Inspector General also found another apparent violation of the Public Officers Law and NYPA's Code of Conduct regarding a loan of a considerable amount of money by a subordinate to a superior. The Inspector General determined that in 2009, Vice President for Public and Government Affairs Thomas DeJesu loaned Kessel \$15,000. Bank account records and testimony substantiate two \$7,500 withdrawals in November 2009 by DeJesu and two checks from Kessel to DeJesu for those same amounts dated May 15 and June 12, 2010. Neither Kessel nor DeJesu reported this loan on their Annual Statements of Financial Disclosure as required by and in violation of the Public Officers Law. Furthermore, the loan itself by a subordinate to a superior appears to violate the Public Officers Law and NYPA's Code of Conduct. As recommended by the Inspector General, NYPA has taken appropriate disciplinary action against DeJesu and has undertaken training of its trustees and employees regarding the prohibition of seeking a loan from a subordinate, and loaning money to a superior.

The Inspector General also found that former NYPA Trustee Elise Cusack solicited employment as a voting member of NYPA's Board of Trustees, which appears to violate the Public Officers Law and NYPA's Code of Conduct. Cusack had discussions with NYPA executives regarding a newly created part-time position in Western New York in the year preceding her resignation, while at the same time voting on issues relevant to Western New York and on matters presented to the Board by Kessel, who, upon her hiring, would become Cusack's direct supervisor. Unaware of the specific circumstances surrounding Cusack's intentions, Brown, at Kessel's direction, instructed a staff attorney to draft a legal memorandum discussing the propriety of maintaining Board membership while employed at NYPA. As a result, the

memorandum failed to address the propriety of Cusack actively seeking paid employment while serving on the Board, or holding a paid position immediately after leaving the Board. As the Inspector General recommended, NYPA has formulated a policy that precludes an active Board member from seeking NYPA employment and sets up other parameters of conduct to prevent even the appearance of impropriety.

The Inspector General did not find any undue influence with regard to the contributions made to Long Island organizations. Rather, ample documentation supports that all contributions from around the state were subject to the same robust process; that Kessel only had final approval of the contributions; and that the review and approval process was completed in each case where a contribution was made. However, unlike the NYPA Contributions and Sponsorships policy, no multi-level, formal review and approval process exists at NYPA to monitor what NYPA calls business expenses but are contributory in nature. Accordingly, the Inspector General recommended that NYPA establish a formal policy that is modeled after the Contributions and Sponsorships Policy to identify and monitor these business-related contributions. Specifically, documentation should include written justification for the expense by NYPA staff, why NYPA's participation is pertinent to its mission, and how NYPA staff will be participating. The documentation should include full disclosure as to whether a NYPA employee is a member of or has any ties to the organization to which funds would be given. Furthermore, NYPA should obtain documentation from the organization receiving the funds as to what specific purpose the NYPA money will be used; it should create a multi-layer review and approval process beyond the requesting department which should be more rigorous as the amount increases; and review should include the Legal Department to ensure the business-related contributions meets the same criteria as those for charitable contributions.

Further, to ensure continued integrity and fiscal responsibility, NYPA should maintain a tracking system of all charitable contributions and business-related contributions. A monthly report should be prepared that delineates the month's contributions, sponsorships, business-related contributions, and the yearly total, and that report should be presented to the NYPA board at its regularly scheduled meetings for comment and review.

As recommended, NYPA has developed and implemented a comprehensive policy addressing all the above recommendations pertaining to charitable and business-related contributions.

The Inspector General is forwarding these findings to the Joint Commission on Public Ethics for review.

## **V. CORRECTIVE ACTIONS TAKEN BY NEW YORK POWER AUTHORITY IN RESPONSE TO THE INSPECTOR GENERAL'S FINDINGS AND RECOMMENDATIONS**

The Inspector General shared the findings and recommendations of this investigation with NYPA and assisted NYPA in formulating corrective action. NYPA has undertaken or will undertake the following relative to each of the Inspector General's recommendations outlined hereinbefore:

- (1) The Inspector General recommends that NYPA engage in a management audit to discern weaknesses in its current policies and procedures and its management structure.**

After a competitive solicitation, NYPA engaged an independent third party (Ernst & Young) to conduct a management audit of its procurement policies and practices, including an evaluation of the Procurement Department's organizational and reporting accountabilities and structure; guidelines; policies and procedures; systems and key initiatives. This management audit will also include a review of the Internal Audit Department's methodology, procedures and resources utilized for conducting audits of NYPA's procurement practices, contracts and vendors. Ernst & Young has commenced the management audit.

- (2) The Inspector General recommends that NYPA develop more exacting procurement standards and mandate full documentation and retention of records.**

NYPA included the review of all of its procurement standards (including document creation and records retention) in the management audit scope of work to be performed by Ernst & Young, which was engaged in response to Recommendation (1). NYPA will revise its

procurement standards within ninety days after the completion of the independent management audit.

- (3) The Inspector General recommends that NYPA redraft its RFP conflict of interest disclosure requirement to include any personal conflicts of interest, actual, potential or perceived.**

NYPA included the redraft of its RFP conflict of interest disclosure requirement in the management audit scope of work to be performed by Ernst & Young, which was engaged in response to Recommendation (1). NYPA will revise its third party conflict of interest disclosure requirement within ninety days after the completion of the independent management audit.

- (4) The Inspector General recommends that NYPA should engage in training regarding the requirement of NYPA employees to disclose all professional and personal conflicts of interest, actual, potential or perceived, and then to recuse themselves when appropriate.**

NYPA revised its Code of Conduct at the Board of Trustees' annual meeting in March 2013 and included the requirement that its trustees and employees disclose all professional and personal conflicts of interest and recuse themselves from engaging in any NYPA business activity where the conflict appears or exists. NYPA's Office of Ethics and Compliance conducted training for its trustees and employees during the second and third quarters of 2013 advising them of this new ethics requirement.

- (5) The Inspector General recommends that NYPA should engage in training regarding the prohibition of seeking a loan from a subordinate, and loaning money to a superior.**

NYPA revised its Code of Conduct at the Board of Trustees' annual meeting in March 2013 and included the prohibition that its trustees and employees refrain from seeking a loan

from a subordinate, and loaning money to a superior. NYPA's Office of Ethics and Compliance conducted training for its trustees and employees during the second and third quarters of 2013 advising them of this new ethics requirement.

In addition, in response to the Inspector General's finding that NYPA employee Thomas DeJesu's personal loan to former NYPA President and CEO Richard Kessel appears to violate the Public Officers Law and NYPA's Code of Conduct, NYPA implemented corrective actions with Mr. DeJesu in March 2013 through its performance management process. A component of this corrective action was that Mr. DeJesu be re-trained on NYPA's Code of Conduct and execute a Certification stating he will remain in compliance with the Code of Conduct.

**(6) The Inspector General recommends that NYPA formulate a policy that proscribes an active Board member from seeking NYPA employment.**

NYPA revised its "Recruitment and Job Posting Policy" in March 2013 and included the prohibition that an active Board member (Trustee) cannot seek NYPA employment. Each Trustee has signed a certification acknowledging their understanding and commitment to follow this new requirement.

**(7) The Inspector General recommends that NYPA establish a formal policy that is modeled after the Contributions and Sponsorships policy to identify and monitor its business-related contributions.**

NYPA developed a comprehensive policy to identify and monitor its business-related contributions at the Board of Trustees' annual meeting in March 2013. The policy includes a multi-level, formal review and approval process. It requires employees to submit written justifications for the requested expenses, identify why and how NYPA's expenditure of funds is related to its mission and how NYPA staff will participate in the requested activity or event. In addition, NYPA has developed and now maintains a tracking system of all contributions

expended under its Contributions and Sponsorships policy and the newly created business-related contributions policy. A report containing all contributions expended in accordance with these policies is provided to its Board of Trustees at each of their regularly scheduled meetings.